IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 313 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 YES; 3 to 5 NO

BALDEVBHAI PREMJIBHAI CHAUHAN

Versus

STATE OF GUJARAT

Appearance:

MR KJ SHETHNA with MR MG NAGARKAR for Petitioner

MR AJ DESAI APP for Respondent No. 1

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 04/08/2000

C.A.V. JUDGEMENT

1. The concurrent judgments of conviction and sentence for the offence punishable under Section 409 of the Indian Penal Code are brought under challenge by the petitioner accused in this revision application under

Section 401 read with Section 397 of the Code of Criminal Procedure.

2. The facts indicated by the evidence on record on the basis of which the accused is convicted are, in brief, as follows: The petitioner, a bailiff in the Court of the learned Civil Judge, Dhandhuka, marked his presence on duty at 10.20 in the morning on 24.6.1988, which was a Friday. He was, admittedly, on local beat, meaning that he was assigned the duty of serving the processes in the local area. There were five other bailiffs, out of whom two were normally assigned the duties of visiting the bank and the treasury for depositing or withdrawing money and the necessary identity cards were also issued to them. However, on 24.6.1988, three challans, which were prepared on 23.6.1988 and in which the name of the accused was mentioned as the person who would tender the money, were entrusted to the accused along with the amount of Rs.535/- for being deposited in the bank. Neither the money was paid in the bank nor the accused returned the challans till 28.6.1988. Therefore, a complaint was filed and an F.I.R. was lodged in the Dhandhuka Police Station in the evening of 28.6.1988. On the next day, i.e. 29.6.1988, the accused visited the police station and voluntarily produced the challans and the money and he was immediately arrested. The defence of the accused was that he had received a message that his sister was suddenly taken ill and therefore he submitted a casual leave report for 24.6.1988 as also an application to leave the headquarter on 25.6.1988 and 26.6.1988 and a casual leave report for 27.6.1988 and 28.6.1988 and thereafter left for Viramgam from Dhandhuka. On 29.6.1988, the clerk of the court, who had lodged the F.I.R., told him that he was required in the police station where he went. In view of the inconsistent stand taken by the accused in his defence and in his statement recorded under Section 313 of the Cr.P.C., the evidence of the prosecution was believed almost in its entirety. And the Appellate Court further emphasised the fact that even when the accused reported for duty on 29.6.1988 and was told that he was required in the police station, he went to the police station at around 6.30 in the evening and hence the plea of the accused of, at the worst, mere retention of money on account of sickness of his sister and absence was not accepted. The Appellate Court further did not believe that Shri B.B.Patel, who played the most important role in prosecuting the accused, had kept with himself the leave reports given by the accused.

3. This petition against the concurrent judgments is argued mainly on the grounds that both the lower Courts have not taken into consideration the real circumstances of the case and that misappropriation was never established so as to bring home the charge of criminal breach of trust. Before embarking upon a critical scrutiny of the evidence on record, the learned counsel for the petitioner has referred to the provisions of Sections 397 and 401 of the Cr.P.C. and submitted that this is a gross case in which perverse findings are recorded in violation of the basic tenets of criminal jurisprudence which has resulted into miscarriage of justice and untold misery to the accused.

4. Going through the records and proceedings which were called for, Ex.3 is a muddamal receipt dated 29.6.1988, according to which, the accused voluntarily produced the money and the challans in the police station. The charge framed against the accused at Ex.8 states that by not depositing the money in the bank, the accused had utilised the money for his personal use and thereby committed criminal breach of trust punishable under Section 409 of the I.P.C.

4.1 The first prosecution witness, namely, Shri D.S.Bandhaniya, who filed the complaint, is examined at Ex.13. He was the clerk of the court at the relevant time and was absent on 24.6.1988. He has deposed that Shri B.B.Patel had informed him that the learned Civil Judge had gone to inform the learned District Judge on 27.6.1988, and on 28.6.1988, upon not receiving any message for filing the complaint, when the District Court was contacted by phone, instruction was given to file a complaint before the police. Accordingly, Shri Bandhaniya filed the complaint on 28.6.1988 while the learned Civil Judge again went on leave for more than a week from 28.6.1988. He has categorically stated in his examination-in-chief that after filing of the complaint on 28.6.1988, the accused never reported for duty in the Court. He has admitted in his cross-examination that he has no personal knowledge about what had happened on 24.6.1988 as he was on leave. However, he has admitted that in the regular course the work relating to bank and treasury was entrusted to other bailiffs whose name was also submitted to the bank for that purpose. It has to be noted that in his complaint at Ex.18, initially there is only a statement that the moneys sent with the challans were not credited in the bank and the accused had not reported for duty till 28.6.1988. A few crucial words to suggest that the accused had not reported "in the Court", that the money entrusted to him were

"Government" money and that the complaint was regarding "misappropriation" have been added between the lines. The time registers produced at Ex.15 and 16 show that on 24.6.1988, the other bailiffs to whom the work of depositing or withdrawing money was entrusted in the regular course were present. Ex.23 is the order of suspension consequent upon the arrest of the accused.

4.2 The second prosecution witness, namely, Shri N.M.Bhuria, the accountant, is examined at Ex.24. He has stated that the money and the challans were entrusted by him to the accused at 11.30 in the morning and as he had not returned by the evening, he had made remarks to that effect in the accounts book (Ex.22) with a red ball-pen and the said remarks were also signed by Shri B.B.Patel, who was in charge of Nazir on that day. In fact, on record there is a copy of a page of the time-register at Ex.15 on which firstly 'Ex.28' and striking it, 'Ex.22' is written in red ink. The remarks referred to by the witness are found in Ex.28 which are 3 broad sheets showing receipts and expenditure between 22.6.88 and 24.6.88. The remarks in the last column against 24.6.88 in the page showing expenditure reads as under:

"Remarks: Today at 11.30 noon, Rs.535/- being the amount of fine in criminal cases were given to B.P.Chauhan by challan, but the bailiff has not deposited the said amount in the bank nor has he returned the challan and the amount of fine; nor has he informed about it. Hence, a complaint is filed in the police station.

Date 24.6.1988 Sd/- N.M.Bhuria
Sd/- B.B.Patel, Nazir
Sd/- S.M.Padhya
Civil Judge (JD),
Dhandhuka. "

This witness has deposed that the inquiry about the amount having not been credited in the bank was made on 27.6.1988 and he has confirmed that Shri B.B.Patel was in charge of the complainant Shri Bandhaniya.

4.3 According to the other witness examined at Ex.31, i.e. Shri I.P.Gohil, who was the bailiff admittedly holding the identity card for monetary transaction with the bank, sitting idle in the bailiffs' room on 24.6.1988 having not gone to serve any process on that day, was asked by Shri B.B.Patel to inquire in the bank on 24.6.1988 at around 5.00 in the evening. The officer in charge of the police station on 28.6.1988 is examined at

Ex.32 and has admitted that when Shri Bandhaniya came to file the complaint, there were one or two persons with him.

4.4 According to Shri B.B.Patel, the senior clerk, examined at Ex.35, he was in charge of C.O.C. on 24.6.88, the accused had reported for duty on that day and as a part of his duty to do the local work, the accused was required to do the work of depositing money in the bank. He has further produced the muster roll (Ex.36) wherein he has shown the presence of the accused on 24.6.88. Remarkably, after 24.6.88 the accused is not shown to be present, but only a remark "suspended" is written in the last column in the muster roll. He has deposed that he enquired in the evening through the other bailiff as stated earlier, to find out that the amount was not deposited and the accused was not found. This witness further stated that Shri Bhuria maintained the cash register and referring the same he deposed that the remarks made with red ballpen are in the handwriting of Shri Bhuria and it is signed by him also, while the learned Civil Judge Shri Padhya signed the same on 27.6.88 when he resumed for a short while on 27.6.88. He has further confirmed that the accused had never presented himself in the Court after taking away the challans and the money on 24.6.88.

4.5 In his cross-examination Shri B.B.Patel has admitted that the other two bailiffs having identity cards were present on 24.6.88 but ordinarily the bailiff whose name was shown in the challan had to go to the bank. He has also admitted that the learned Civil Judge had left to go to Narol at around 2 p.m. on 27.6.88 and although his charge was with another Civil Judge, he had not informed or contacted such other Judge on 24th, 25th or 26th. He specifically denied that the remarks made with red-ballpen (apparently by mistake mentioned as in Ex.22) were made afterwards. He has admitted that he had gone to the police station with the complainant Shri Bandhaniya and that he had never seen the accused in the Court after 24.6.1988. He has denied the suggestions that he had made out a false case against the accused out of prejudice for him and that the accused had submitted leave reports for the period from 24.6.88 to 28.6.88.

4.6 Both the panchas of the panchnama (Ex.30) recording voluntary handing over of the challans and the money in the police station on 29.6.88 by the accused, turned hostile and have denied being witness to such an event in their depositions at Ex.29 and 37. The investigating officer has at Ex.37 deposed that during

his investigation the accused was not found at the residence and on 29.6.88, the accused had presented himself in the police station and produced the challans and the money at 6.30 p.m.

4.7 After the last deposition recorded on 31.1.1989, the statement of the accused is taken on 8.2.1989 wherein he has attempted to deny every circumstance appearing against him, but also stated that the other bailiff are entrusted the work relating to bank and treasury and that on being told on 29.6.88 by the C.O.C. in the Court that he was required at the police station, he had gone there. However, in reply to the last of the elaborate questions framed in advance, he has said that he was producing his written statement of defence which appears to have been submitted on 13.2.89. According to this statement, his defence, in substance, is that, on 24.6.88, after reporting for duty, he received the information that his sister living in Viramgam was suddenly taken ill and hence, after submitting leave reports for 24 to 28.6.88, he had left. On returning from leave, on 29.6.88, when Shri Bandhaniya told him that he was called at the police station, he had presented himself before the police. He has stated the reasons for which the other staff had malice against him and that he was sought to be ousted from the Court by them by filing and prosecuting the false case. According to his statement, on 24.6.88, the challans and money were entrusted to Shri I.P.Gohil, the other bailiff who was issued the identify card to do the work relating to bank and treasury. That the five days of his absence were utilised by the rest of the staff to frame him into a charge and his leave reports were made to vanish instead of being put up for approval before the other learned Civil Judge in charge. Thus, the accused has suggested an angle of conspiracy against him which was required to be examined in light of the evidence on record.

5.1 In dealing with the case, the learned Chief Judicial Magistrate of the trial Court has discussed in detail the evidence led by the prosecution to prove the case and discarded the important statements made in the cross-examination of the witnesses with the cryptic remarks that nothing important is said in it which could shake the prosecution case or suggest an alternative version. The judgments cited on behalf of the accused are mentioned only to hold that in the facts of the case they were not applicable. Thus, after briefly recounting the evidence supporting the case of the prosecution, it is observed that the documentary evidence in this case was so strong that reading the same with the related oral

evidence, it was sufficient and then it is directly held that the charge that the accused had misappropriated the amount of Rs.535/- is proved.

5.2 During the course of hearing of the appeal from the judgment as above, the learned Additional Judge has heavily relied upon the statements of the accused recorded under Section 313 of the Code of Criminal Procedure in the context of the contentions raised before him. It appears that the accused mainly contended in the appeal that the alleged voluntary production of the challans and the money before the police, at best, proved retention of money and no dishonest misappropriation or conversion.

Thus, after accepting the uncorroborated statement of Shri Bhuria that the amount and challans were entrusted to the accused as the gospel truth, it appears that, the denial by the accused in his statement under Section 313 of the Cr.P.C. that he produced the challans and the money before the police clinched the issue against him and the appellate Court refused to interfere with the conviction and sentence awarded to the accused.

6.1 As noted earlier, the chargesheet and the charge alleged that the accused had converted to his own use the money entrusted to him which obviously turns out to be a matter of inference. In evidence, the complainant was admittedly absent on 24.6.1988 and Shri B.B.Patel was in his charge. The learned Civil Judge of the Court concerned, namely Shri Padhya, was on leave on 23.6.1988 and 24.6.1988. He came to the Court on 27.6.1988 and went away by 2.30 p.m. allegedly to inform the learned District Judge about the incident. This was told to the complainant by Shri B.B.Patel. The instructions to file a criminal complaint had not come at the instance of the learned District Judge but on 28.6.1988, the District Court was contacted by phone and instruction to file a complaint was obtained. It is not clear as to what was conveyed by whom over the telephone. Significantly, the learned Civil Judge was not in the Court either on 24.6.1988 or when the instruction is supposed to have been obtained nor on 28.6.1988 when the complaint was filed. The complainant has admitted that in the regular course the work relating to bank and treasury was entrusted to other bailiffs whose names were also submitted to the bank for that purpose. In absence of the learned Civil Judge, the complaint is obviously filed at the behest of Shri B.B.Patel who admittedly accompanied the complainant to the police station also.

And a few crucial words have been added between the lines in the complaint which was initially couched in the form of a report.

6.2 The second prosecution witness, Shri N.N.Bhuria, the accountant, is the only person to depose and testify that the money and the challans were entrusted by him to the accused at 11.30 a.m. He has admittedly made the remarks in the account book as quoted hereinabove. These remarks are obviously calculated to make a contemporaneous documentary record of the fact that the money was entrusted to the accused at 11.30 on 24.6.1988 and that he had neither deposited the amount nor returned the challans and the amount. The remarks further state that a complaint is filed in the police station and the date of 24.6.1988 is put below which signatures of this accountant as well as Shri B.B.Patel in the capacity of Nazir (for being in charge of Nazir on that day) are put and the learned Civil Judge is stated by Shri B.B.Patel to have signed these remarks on 27.6.1988 when for a brief period he was present in the Court. Shri B.B.Patel has categorically denied that these remarks with red-ballpen have been added afterwards. He has also admitted that although the charge of the learned Civil Judge, in his absence, was with another Civil Judge Shri Keshwani, he never contacted him in relation to the alleged incident. The other bailiff who was admittedly issued the identity card for dealing with the bank and who was admittedly sitting idle on 24.6.1988 is examined only to say that he had inquired in the bank at around 5.15 p.m. and reported to Shri B.B.Patel on 24.6.1988 that the accused had not visited the bank to deposit the money. Thus, it is clear that the accountant Shri Bhuria, the senior clerk Shri B.B.Patel and the bailiff Shri Gohil, have taken special care to make the aforesaid remark a record of fact but it is not clear and totally lost sight of as to how a complaint is stated to have been filed in the police station on 24.6.1988 when neither the complainant nor the learned Civil Judge was present nor the instruction to file a complaint had been obtained and the complaint and the FIR are dated 28.6.1988. This significant piece of documentary evidence clearly indicates that a case was being concocted on 24.6.1988 itself by the three persons mentioned above. And if, in light of this, the first part of entrustment of money and challans is examined, there is no evidence except the bare words of Shri Bhuria to suggest that the money and the challans were entrusted to the accused in the first place.

6.3 The other very important fact that emerges from

the record is that Shri B.B.Patel has filled up the muster roll in which the accused is shown to be present on 24.6.1988 but never thereafter. Shri Bandhaniya has categorically stated that the accused has never reported for duty after the filing of the complaint on 28.6.1988. He was told that the accused had gone to deposit the money on 24.6.1988 by Shri B.B.Patel and not by Shri Bhuria. And Shri B.B.Patel has also twice categorically confirmed that after 24.6.1988 the accused never presented himself in the Court. In such circumstances, it is nowhere the case of the prosecution that the accused was told on 29.6.1988 by any of the witnesses that he was required in the police station. Even taking the statement of the accused himself, although he has stated that he had reported for duty on 29.6.1988, when the C.O.C. told him that he was called at the police station, it is nowhere stated at what time such instruction was passed. If such statement of the accused made in reply to the question as to why he had not reported for duty after the filing of the complaint is discarded as unreliable, just as the other statements made by him are, then the documentary and the oral evidence of the prosecution only prove that the accused had not reported for duty on 29.6.1988. In view of both the panch witnesses denying that the money and the challans were produced by the accused in the police station, all that is proved beyond doubt is that the accused voluntarily presented himself in the police station at 6.30 p.m. on 29.6.1988. His voluntarily producing the money and the challans can be believed only if entrustment of the same on 24.6.1988 were to be believed.

7. Section 313 of the Cr.P.C. provides for giving an opportunity to the accused personally to explain any circumstances appearing in the evidence against him. As observed by the Law Commission in its 41st Report, "this section for a moment, brushes aside all counsel, all prosecutors, all witnesses and all third persons. It seems to establish a direct dialogue between the Court and the accused for the purpose of enabling the accused to give his explanation.....It has to be borne in mind that there are several offences (such as, receipt of stolen property) which are of such a nature that the accused has to give his explanation because in the absence of a reasonable explanation, the accused runs the risk of being convicted by the Court". It is further observed that: "The existing provision in Section 342 (2) enabling a Court to draw an inference, whether adverse or not, from an answer or refusal to answer a question put to the accused, during the examination, is being omitted as it may offend Article 20 (3) of the

Constitution." As held by the Hon'ble Supreme Court in KISHAN CHAND v. DELHI ADMINISTRATION (AIR 1979 SC 1128), any stand taken by the accused can hardly be used as evidence unless its truth is otherwise established. It is a common place that the Court cannot supplement the prosecution evidence by selecting only the passages which

might corroborate the prosecution evidence and reject the other part of the statement of the accused. The defence version given by the accused can be used to give benefit of doubt if his version is found to be probable. But the statement recorded under Section 313 cannot be regarded as evidence for conviction of the accused (See AIR 1953 SC 247). In any case, it is incumbent upon the Court to look to the explanation given by the accused to find out whether the said explanation was reasonable and if a probable alternative version of the event emerges, the accused is entitled to be exonerated of the charge.

8. In this view of the matter, the straight and simple alternative version submitted by the accused is that, on 24.6.1988, he did report for duty and went on leave after submitting leave reports for his absence and reported again on duty on 29.6.1988. During this period, the other staff had reasons to maliciously concoct a case against him and that, in fact, he was neither entrusted with the money and the challans nor had he produced the same before the police. As a part of the conspiracy against him, the leave reports were not submitted to the learned Civil Judge in charge for approval and he was shown to be only absent. Looking from this angle of conspiracy of the three witnesses, it appears to be more probable that the money and the challans were not entrusted to the accused as no one testifies to this effect except Shri Bhuria who has put the remarks referred above on 24.6.1988 itself about having filed a police complaint before it could have been even contemplated. With the entrustment itself under the cloud of doubt, the subsequent events fall into place and the deposition of the witnesses can hardly bring home the charge of even temporary retention of money, not to speak of misappropriation and conversion of the amount to his personal use by the accused. The deposition of the witnesses to the effect that the accused was never seen in the Court after 24.6.1988 can only be understood to mean that without any impetus the accused had voluntarily visited the police station which would also help negative the charge of misappropriation in the circumstances of the case.

9. The learned counsel for the petitioner has relied

upon the judgment of this Court in BHANUBHAI RAMBHAI v. STATE OF GUJARAT (1976 GLR 699) to submit that the burden which the accused carried in such cases is lighter one only to probabalise his explanation and he has not to prove the truth of his explanation and so even if his explanation may not be proved on the test of probabilities, the evidence may be such as to affect the ingredient of the offence by displacing the guilty intention. It is pointed out from the judgment in KALI RAM v. STATE OF HIMACHAL PRADESH (AIR 1973 SC 2773) that the golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. It is, no doubt, true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. The learned counsel for the petitioner has also relied on the judgment of the Hon'ble Supreme Court in SARDAR SINGH v. STATE OF HARYANA (AIR 1977 SC 1766) to submit that what Section 409 required was something much more than mere failure or omission to return the money and it was incumbent upon the prosecution to show that the accused had dishonestly misappropriated or converted the money to his own use. It was submitted that whereas in the facts of the last mentioned case the entrustment was admitted, in the facts of the present case, even the entrustment is doubtful and even assuming that the entrustment was proved, the prosecution had completely failed in proving any dishonest intention or conversion of the money to his personal use by the accused.

10. Section 409 of the I.P.C. for the offence under which the accused was charged reads as under:

"Sec.409: Criminal breach of trust by public servant, or by banker, merchant or agent-

Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor,

broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

The entrustment of property is the first ingredient of the offence, and commission of criminal breach of trust, which is defined as under in Section 405 of the I.P.C., is also required to be established by the prosecution:

"Sec. 405: Criminal breach of trust -
Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly, misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"

Explanation 1. ......
Explanation 2. ...."

Thus, according to the definition of "criminal breach of trust", misappropriation or conversion to one's own use of the property and the factum of having dishonestly done so are the essential ingredients. And the word "dishonestly" is defined in Section 24 of the I.P.C. as under:

"Sec.24: "Dishonestly" - Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

As seen earlier, analysing the evidence on record, the essential ingredients of the offence with which the accused is charged are not established. On the contrary, the alternative version presented in defence appears to be more probable rather than the imputed entrustment and misappropriation or conversion with a dishonest intention. Under such circumstances, commission of the offence by the accused is not proved, much less proved beyond reasonable doubt.

11. The learned Additional Public Prosecutor has made

a feeble attempt at restricting the scrutiny of evidence by pointing out the limitations on the powers of this Court under Section 397 of the Cr.P.C. on the basis that the concurrent judgments of the two lower Courts ought not to be disturbed by reappreciating the evidence. In this context it is necessary to refer to Section 397 of the Cr.P.C. which reads as under:

"Sec. 397: Calling for records to exercise powers of revision -

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation (1) .....

(2) .....

(3) .....

Under Section 401 of the Cr.P.C., this Court is clothed with the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 which include the power to reverse the findings and sentence and acquit or discharge the accused. A conjoint reading of the legal provisions as above and the facts and circumstances of this case clearly suggest that this is a fit case where the extraordinary powers of an appellate Court are exercised.

12. In the result, the revision is allowed. The judgment and order dated 24.9.1990 of the learned Additional Sessions Judge, Ahmedabad (Rural) in Criminal Appeal No.12 of 1989 and the judgment and order dated 30.6.1989 of the learned Chief Judicial Magistrate, Ahmedabad (Rural) in Criminal Case No.301 of 1989 are set aside and the petitioner is acquitted. The amount of fine paid by the petitioner shall be refunded to him. The bail bonds submitted by the accused shall stand cancelled. Rule is made absolute with no order as to costs.

(KMG Thilake)
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